

9 Official Opinions of the Compliance Board 180 (2014)

- ◆ **1(C)(2) WITHIN ADMINISTRATIVE FUNCTION EXCLUSION: ETHICS COMMISSION’S CHOICE OF ITS OFFICERS OR CONSIDERATION OF ETHICS COMPLAINT**
- ◆ **1(C)(3) OUTSIDE ADMINISTRATIVE FUNCTION EXCLUSION: CONSIDERATION OF NEW REGULATIONS OR POLICY MATTERS**
- ◆ **1(J) QUASI-LEGISLATIVE FUNCTION: CONSIDERATION OF NEW REGULATIONS OR POLICIES**
- ◆ **2(B) NOTICE OF “CLOSED MEETING”: MUST SPECIFY THAT THE VOTE TO CLOSE WILL BE HELD IN OPEN SESSION**
- ◆ **3(C) OPEN MEETING REQUIREMENT: VIOLATED BY MEETING IN CLOSED SESSION WITHOUT ADEQUATE WRITTEN STATEMENT**
- ◆ **5(C) WRITTEN STATEMENT FOR CLOSING A MEETING: REQUIREMENT NOT MET BY UNINFORMATIVE BOILERPLATE**
- ◆ **6(D)(2) CLOSED SESSION SUMMARY: MAY BE INCLUDED IN MINUTES OF THE SESSION THAT WAS CLOSED**

***Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf**

December 10, 2014

Re: Mayor and City Council of Town of Rock Hall
and Ethics Commission of Rock Hall
Grenville B. Whitman, Complainant

Grenville B. Whitman, Complainant, alleges that two public bodies of the Town of Rock Hall, the Town’s Ethics Commission and the Town Council, violated the Open Meetings Act in September 2014. The Town Attorney responded on behalf of each.

1. The Ethics Commission.

As alleged by Complainant and acknowledged by the Town Attorney, this newly-appointed public body failed to give any public notice of its meeting on September 11, 2014. Whether the Ethics Commission thereby violated § 3-302, the provision of the Act that requires public bodies to give public notice of their meetings,¹ depends on whether the meeting was subject to the Act, a question that in turn depends on the function that the Ethics Commission performed at that meeting. *See* §§ 3-301 (public bodies to meet in open session unless Act expressly provides otherwise); 3-103 (listing the functions to which the Act does not apply).

The response does not provide us with any information on what function the Town's Ethics Commission performed at this meeting, so we cannot reach a conclusion on this allegation.² We will therefore provide guidance on some possible outcomes. If the Ethics Commission met to discuss regulations or other policy matters, it performed a quasi-legislative function subject to the Act and violated the Act by not giving public notice of the meeting. *See* 1 *OMCB Opinions* at 32 (if municipal ethics commission discussed policy matters, it performed a quasi-legislative function subject to the Act). If, instead, the Ethics Commission met only to address an ethics complaint or choose its own officers, it likely performed an administrative function, and, in either event, the meeting was not subject to the Act. *See* § 3-103(a) (Act does not apply to public body when it is carrying out an administrative function); *see also* 1 *OMCB Opinions* at 32 (Act would not apply to meetings held by municipal ethics commission to address complaint about employees because that would have been an administrative function); 3 *OMCB Opinions* 182, 185-86 (2002) (Act would not apply to public body's meeting to make appointments to a board, but it would apply to a policy decision about the size of the board).

In any event, the Town Attorney states that the Ethics Commission members, none of whom are Town employees, were

¹ The Act is now codified in the new General Provisions Article of the Maryland Annotated Code and is posted at http://www.oag.state.md.us/Opengov/Openmeetings/10_1_14_OPEN_MEETINGS_ACT.pdf. Section 3-302 (a) provides: "Before meeting in a closed or open session, a public body shall give reasonable advance notice of the session."

² For a similar matter in which we could not reach a conclusion as the function performed by a municipal ethics commission, *see* 1 *OMCB Opinions* 30, 32 (1993). Ordinarily, we would instruct our staff to ask the public body's attorney to make the necessary inquiries. Here, the Mayor's appointment of this ethics commission, termed "somewhat controversial" by the Town Attorney, and the situation described in Part 2 below lead us instead to simply give our advice in the alternative.

apparently unaware of the requirements of the Act. This is not the first appointed committee composed of members of the public who have not been alerted to Maryland's open meetings requirements. We direct the Ethics Commission to the guidance we gave to another such committee on the steps it should follow to give notice of its meetings, hold them openly, and keep minutes. *See* 8 *OMCB Opinions* 188 (2013).³ Public bodies are also subject to the training requirement set forth in § 3-213.⁴

2. The Town Council

Complainant alleges that the Town Council violated two of the Act's disclosure provisions, both as applicable to the Council's closed meeting on September 9, 2014. The meeting notice, posted by several methods on September 8, 2014, described the meeting as a "Special Meeting." The notice stated that "[t]he purpose of the meeting is to convene in closed session, in accordance with the Maryland Open Meetings Act, to consult with legal counsel to discuss a lawsuit filed in Kent County Circuit Court by Mayor Willis against the Town (namely Councilmembers Jones, Price, and Nessor)." The copy of the notice that was provided to us contained no suggestion that any part of the meeting would be open to the public.

On the evening of the meeting, the response states, the Council "initially convened in open session and then promptly moved into closed session." The minutes of the open session reflect an oral motion to close that reflected the wording of the public notice and the adoption of that motion. The Complainant provided us with the closing statement⁵ prepared by the presiding officer, the Mayor. As required by § 3-305(d), the closing statement cites the provision of the Act claimed as authority for closing the session; the form has a check next to the provision that permits a public body to close a session to "consult with counsel to obtain legal advice on a legal matter." *See* § 3-305(b)(7).⁶ In the space on the form for the requisite

³ The opinion is posted at posted at <http://www.oag.state.md.us/Opinions/Open2012/8omcb188.pdf>.

⁴ The training requirement is explained at <http://www.oag.state.md.us/Opengov/Openmeetings/training.htm>.

⁵ For an explanation of the Act's requirement that, before the public body convenes in closed session, the presiding officer prepare a written statement that discloses three items of information about the closed session, see 9 *OMCB Opinions* 57 (2013). There, we addressed the adequacy of the closing statement that a different presiding officer prepared for a closed session held by this Council. <http://www.oag.state.md.us/Opinions/Open2013/9omcb57.pdf>.

⁶ The model forms on the Attorney General's website have been revised to reflect the recodification of the Act into the General Provisions Article. <http://www.oag.state.md.us/Opengov/Openmeetings/index.htm>.

statement of “the reasons for closing” and “topics to be discussed,” the Mayor wrote “Legal.” Complainant states that the Town Attorney advised the Mayor that “he should copy onto the form the exact wording from the public notice” and that the Mayor refused to do so. That language would have identified the topic of discussion but not the Council’s reasons for excluding the public. It appears from the form that the Mayor conducted the vote at 7:03 p.m. and left at 7:05, and the response explains that he did not participate in the closed session. The minutes reflect the Mayor’s statement that future communications with Council members would be through his attorney. The minutes also reflect that the Council returned to “open session,” where the Town Attorney described the discussion that he and the Council had held in closed session.

The Council held its regular meeting two days later, on September 11. The minutes of that meeting, which the Council adopted at its October meeting, neither contain a summary of the events of the closed session nor mention that the session had occurred. Also at its October meeting, the Council adopted a separate set of minutes for the September 9 meeting.

Complainant’s first allegation about the “Special Meeting” is that the closing statement is deficient under the Act. He states that the word “‘Legal’ . . . cannot be considered sufficient explanation and justification for the Council members to move into a closed session.” The Town Attorney agrees, states the applicable principles, and conveys the Council’s concession that “the documentation falls short of the Act’s minimum requirement.”

The only twist here is the backdrop of the Mayor’s lawsuit against several Council members, coupled with the Mayor’s intention not to attend the closed session and refusal to record on the closing statement the content of the meeting notice. Those facts, however, do not excuse compliance with the Act. The Act required the presiding officer to provide meaningful information on the topics to be discussed and the Council’s reasons for discussing them in secret, in whatever words would convey that information. More to the point, the Act does not permit a public body to convene in closed session until those disclosures have been made. We find that the Council violated the Act by meeting behind closed doors without meeting the conditions set by § 3-305(d).⁷

Next, Complainant alleges that the Council violated the provision of the Act that requires a public body to report on the events of a meeting closed under § 3-305. Under § 3-306(c)(2), the public body must summarize the

⁷ The Act does not address situations in which the presiding officer refuses to complete a closing statement, but this presiding officer left shortly after the vote and the vice mayor took his place. Nothing in the Act prevents a public body from amending a closing statement before it goes into closed session.

closed session in the written minutes of its next open session; that way, the information is provided promptly, and members of the public know where to look. Here, the information was provided just as promptly as it would have been had the Council included the summary in the September 11 minutes, and the summary contained the information required by the Act. Furthermore, many public bodies routinely include a closed-session summary in the minutes of the meeting that was closed; for regularly-scheduled meetings, the public usually gets the information more quickly that way. It would thus appear that the Council substantially complied with § 3-306(c)(2). It also appears, however, that Complainant did not know where to look for this summary. As to that, we note that the notice for the September 9 meeting described only a closed session, and a member of the public would not necessarily expect the Council to have adopted publicly-available minutes for it. And, although Complainant either saw the meeting notices during the day-and-a-half they were posted or learned about the meeting later, someone who did neither of those things might not know that the Council had met and that such minutes should exist. So, while we find that the Council substantially complied with § 3-306(c)(2), we also note that this allegation was avoidable. When public bodies hold “special” closed meetings on short notice, they should mention the meeting and closed-session summary in the minutes of the next regular session to ensure that the public knows that the meeting occurred and where to find the summary.

To these findings we add our concern that the September 9 meeting notice, at least as provided to us, did not inform the public that the closed meeting would be preceded by an open session. The Act entitles the public to observe their officials make the decision to conduct business privately and to hear the officials’ reasons for that decision. *See, e.g.* 8 *OMCB Opinions* 150, 158 (2013) (“A public body . . . may not effectively exclude the members of the public from observing the vote by advertising the meeting as entirely closed.”). Accordingly, it is a violation of the Act to post a meeting as entirely closed when the public body must initially meet in open session. *See id.*⁸ *see also* 9 *OMCB Opinions* 1, 5 (2013) (“The

⁸ There, in finding that a board of regents violated the Act by posting a meeting subject to the Act as entirely closed, we advised:

[W]hen a public body intends to exclude the public from either part of a meeting or all of its meeting except for the initial closing motion and vote, [§ 3-302] requires the public body to convey that message in its notice, unless the need to exclude the public arises too late to amend the notice. For the December 4 meeting, the Board could have conveyed that message by posting a notice to the effect that “The Board will meet in open session only for the purpose of voting to close its meeting to discuss matters that the Open Meetings Act permits it to discuss in

violation is not merely technical; when a public body meets to perform a function covered by the Act, the public is to be given the opportunity to observe the vote [to close] and to be informed of why the meeting will be closed”).

Conclusion

We were unable to reach a conclusion on the allegations about the Ethics Commission’s September 11, 2014 meeting, so we advised the Ethics Commission on several possible scenarios and directed it to information on how to comply with the Act.

We have found that the Council violated the Act by meeting in closed session on September 9, 2014, on the basis of an inadequate closing statement. We have additionally noted that the Council’s notice of that meeting effectively excluded the public from the “open” part of that meeting by mentioning only that the meeting would be closed. Finally, we have found that the Council substantially complied with the provision of the Act that requires a public body to disclose the events of a closed session, and we have suggested ways in which to avoid future such complaints.

Open Meetings Compliance Board

Monica J. Johnson, Esquire
Wanda Martinez, Esquire

closed session.” When a public body posts such a notice, of course, it should not discuss any other matters in open session.

Id.